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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

PERFECT 10, INC., a California
corporation,

Plaintiff,

v.

IWEB GROUP, INC., a Canadian
company d/b/a/ iWeb.com; IWEB
INTELLECTUAL PROPERTY, INC., a
Canadian company d/b/a iWeb.com;
IWEB TECHNOLOGIES, INC., a
Canadian company d/b/a/ iWeb.com; and
DOES 1 through 100, inclusive
Defendants.

Case No. 13 CV 0328 BTM BLM

**REPLY MEMORANDUM IN
SUPPORT OF DEFENDANTS'
MOTION TO DISMISS**

Judge: Hon. Barry Ted Moskowitz
Court: 15B
Date: June 28, 2013
Time: 11:00 A.M.

**NO ORAL ARGUMENT UNLESS
REQUESTED BY COURT**

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1 If Plaintiff (“P10”) truly sought to stop unauthorized use of its images, it
2 would have sent DMCA notices to the website operators that allegedly host the
3 infringing images—as iWeb Technologies (“iWeb”) suggested after P10 contacted
4 it. But P10 does not pretend it ever notified those who actually control the websites.
5 P10 instead seeks a windfall by staging claims against Defendants, who do not
6 direct the content of those sites, in hopes that the cost and burden of litigating in a
7 distant, foreign jurisdiction will force Defendants to pay P10 off. As P10 has
8 neither a jurisdictional nor a substantive basis for its claims, this gambit fails.

9 P10 seeks to hold iWeb liable for the actions of its customers and its
10 customers’ customers. iWeb is a Canadian company that maintains computer
11 servers only outside the United States, in Montreal, Canada. Over 20,000 customers
12 worldwide operate these servers dedicated *for their own use*. iWeb itself does not
13 develop or run any website P10 accuses of infringement (iWeb’s own website is
14 merely a storefront for its server service). iWeb’s offices, employees, and facilities
15 are solely in Montreal, Quebec, Canada. Toupin Decl. (Dkt. 14-5) ¶¶ 5-8. P10
16 alleges that iWeb *customers* who access iWeb servers in Montreal operate, or resell
17 to those that operate, websites that allegedly copied P10’s pornographic images—
18 without iWeb’s foreknowledge.

19 In addition, no personal jurisdiction exists over Defendants because iWeb is
20 an Internet service provider (“ISP”) that merely provides servers and bandwidth to
21 persons that P10 accuses of disseminating infringing works, *see ALS Scan, Inc. v.*
22 *Digital Serv. Consultants, Inc.*, 293 F.3d 707, 709, 715 (4th Cir. 2002), and the
23 other Defendants have no servers. P10 muddies the waters by refusing to withdraw
24 allegations it knows to be false or unreliable, including false claims about now-
25 dismissed New Dream Network (“NDN”) and the false claim, based on a defunct
26 Ukrainian website, that iWeb has a California data center. Other than this
27 misinformation and mischaracterizations in P10’s declarations (*see* Defendants’
28 Evidentiary Objections), P10 does not show Defendants have sufficient contacts in

1 this district or anywhere in the United States for personal jurisdiction.

2 P10 also fails to plead a basis for substantive liability. P10 does not plead the
3 volitional conduct that courts—including the most recent court to dismiss P10
4 claims against an ISP, *Perfect 10, Inc. v. Giganews, Inc.*, No. 11-7098, 2013 WL
5 2109963, at *6 (C.D. Cal. Mar. 8, 2013)—have required for a claim of direct
6 infringement. P10 instead incorrectly argues that passive automated processes
7 make ISPs liable. But iWeb neither chooses nor controls any purported copying by
8 its customers, and without any plausible facts showing that iWeb intended for
9 infringement to occur, P10 fails to state a claim for contributory infringement. P10
10 tries to stretch the law to make *any* provider of general services liable if some
11 downstream customer infringes, an absurd theory that would even make *power*
12 *companies liable for not turning the power off to any company accused of*
13 *infringement*. The Court need not accept P10’s absurd argument.

14 **I. MINIMUM CONTACTS FOR JURISDICTION ARE ABSENT.**

15 *Even if Perfect 10’s allegations about Defendants’ business were all true—*
16 *which they are not—no personal jurisdiction exists.*

17 **A. California Customers Do Not Establish General Jurisdiction.**

18 No general jurisdiction exists over a defendant unless its contacts with the
19 forum are so extensive that they “approximate physical presence.” *See*
20 *NationalEFT, Inc. v. Checkgateway, L.L.C.*, No. 12-cv-1498, 2013 WL 593759, at
21 *4 (S.D. Cal. Feb. 15, 2013) (holding that business with 1,000 California
22 merchants, including plaintiff, was insufficient for jurisdiction). California-based
23 contracts and revenue signify “doing business with California, but not necessarily
24 doing business in California,” especially where a defendant has “no offices, real
25 property, or staff in California, is not licensed to do business in California, and pays
26 no California taxes.” *See Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218,
27 1222, 1226 (9th Cir. 2011) (finding no general jurisdiction over out-of-state website
28 operator that allegedly posted infringing celebrity photos). Even “numerous and

1 repeated electronic connections” with persons in the forum state do “not add up to
2 the quality of contacts necessary” for jurisdiction. *ALS Scan*, 293 F.3d at 709, 715
3 (finding no jurisdiction over ISP that provided bandwidth to customers who posted
4 infringing images to their websites). Thus, even accepting P10’s assertions that
5 iWeb does extensive business with California entities, no general jurisdiction exists.

6 **B. Arms-Length Customer Relationships with Purported Infringers**
7 **Do Not Establish Specific Jurisdiction.**

8 On facts mirroring those here, the court in *ALS Scan* also found no specific
9 jurisdiction. *See id.* at 709. There, as here, the plaintiff alleged that the defendant
10 ISP enabled customers to publish infringing images online by providing them with
11 the bandwidth for operating their websites. *See id.* But the ISP, like iWeb, only had
12 an “arms-length customer relationship” with the alleged infringers, did not select
13 the images, and received no income from the websites’ subscribers. *See id.* The role
14 of the ISP, like iWeb, was “at most passive” because it did not transmit the
15 infringing photographs “specifically to [the forum state] with the intent of engaging
16 in business or any other transaction in [the forum state],” so no jurisdiction existed
17 regardless of whether the ISP continued to enable the websites after receiving
18 notice of their infringement.¹ *See id.* at 714-15.

19 Nor do allegations and evidence that a defendant “does business with
20 California businesses unrelated to the [claim] at issue” confer specific jurisdiction.
21 *See NationalEFT*, 2013 WL 593759, at *9. “[S]pecific jurisdiction is confined to
22 adjudication of issues deriving from, or connected with, the very controversy that
23 establishes jurisdiction.” *Id.* (quoting *Goodyear Dunlop Tires Operations, S.A. v.*
24 *Brown, U.S.*, 131 S. Ct. 2846, 2851 (2011)). Here, any customer relationships that
25 iWeb has in the United States are immaterial because P10 does not, and cannot,
26 plead that iWeb entered into them to further infringement on its customers’

27 ¹ P10 conflates third-party websites with iWeb’s business website, which like that
28 of the ISP in *ALS Scan* is unrelated to Plaintiff’s claim because it “was not involved
in the publication of any infringing photographs.” *See ALS Scan*, 293 F.3d at 715.

1 websites. *See id.* Mere foreseeability that such customer relationships could injure
 2 a plaintiff is insufficient for jurisdiction. *See id.*; *see also Shrader v. Biddinger*, 633
 3 F.3d 1235, 1241 (10th Cir. 2011) (“maintenance of a web site does not in and of
 4 itself subject the owner or operator to personal jurisdiction, even for actions relating
 5 to the site, simply because it can be accessed by residents of the forum state”).

6 Finally, iWeb is wholly different from the *Mavrix* defendant, a website *owner*
 7 that itself published allegedly infringing photos on a website accessible to users in
 8 the forum state. *See Mavrix*, 647 F.3d at 1228. In contrast, iWeb’s customers (or
 9 their customers), not iWeb, allegedly posted P10’s photos.

10 **C. Not Only Does Perfect 10’s “Evidence” Fail to Meet Its Burden to**
 11 **Establish Personal Jurisdiction, It Is Also Unreliable.**

12 Even if iWeb customers in the United States infringed as P10 alleges,
 13 jurisdiction over iWeb is absent, *see ALS Scan*, 293 F.3d at 715, so jurisdictional
 14 discovery is unwarranted. P10 admits that the alleged infringement, as in *ALS Scan*,
 15 is on “third-party” websites. *See id.* (finding no jurisdiction based on ISP’s passive
 16 transmission of infringing photos into forum state); Opp. at 7:19.

17 Lacking any factual basis to allege that iWeb ran the allegedly infringing
 18 websites or intended that they infringe, P10 instead invents falsehoods about iWeb
 19 and proffers immaterial and unreliable “evidence” about its customers. P10’s
 20 Opposition entirely avoids the Complaint’s false allegation that iWeb controls or
 21 owns a San Diego data center. Compl. ¶ 7; Mot. at 5:6-21. Likewise, by dismissing
 22 NDN, P10 conceded that its allegations about NDN being an iWeb reseller in
 23 California were false. iWeb may do business *with* Californians, but P10 cannot
 24 truthfully allege that iWeb does business *in* California (or the United States) to
 25 establish jurisdiction. Toupin Decl. ¶ 8; *see NationalEFT*, 2013 WL 593759, at *9.

26 P10 misleadingly calls allegedly infringing third-party websites stored on
 27 Montreal servers “California based” (Compl. ¶ 8). P10 does not allege that those
 28 specific customers (*e.g.*, iNetReady or KT Tran, Opp. at 5:2-6) participated in any

1 infringement. But even if they were to have done so, whether operators or viewers
2 of infringing websites are in California or the United States is irrelevant—the
3 automated computer functions of a passive ISP whose servers store or transmit data
4 do not create jurisdiction. *See ALS Scan*, 293 F.3d at 715. The location of
5 operators or viewers is relevant only to jurisdiction over *them*, but P10 chose not to
6 pursue any parties actually responsible for the alleged infringing acts.

7 **D. Jurisdiction Is Not Proper Under Rule 4(k)(2).**

8 Even assuming that P10’s factual allegations were true, Rule 4(k)(2) does not
9 establish jurisdiction. “The due process analysis under Rule 4(k)(2) is identical to
10 the traditional personal jurisdiction analysis, however, the contacts are measured
11 with respect to the United States rather than an individual forum state.” *EcoDisc*
12 *Tech. AG v. DVD Format/Logo Licensing Corp.*, 711 F. Supp. 2d 1074, 1087 (C.D.
13 Cal. 2010) (finding no jurisdiction in California or under Rule 4(k)(2) where the
14 defendant’s alleged “aggregated contacts with the United States are no greater than,
15 and not meaningfully different from, its contacts with California”). Here, P10’s
16 allegations about iWeb’s contacts with the United States are as attenuated as its
17 allegations about iWeb’s California contacts, based solely on iWeb doing business
18 with American companies (*e.g.*, “Communication Networks” and credit card
19 processors) or customers (Compl. ¶¶ 9-11). P10 cannot allege that iWeb in Montreal
20 has any more relevant contacts in the United States than in California, so no
21 jurisdiction under Rule (4)(k)(2) exists.

22 **II. P10 HAS LITIGATED IN CANADA AND COULD DO SO AGAIN.**

23 As to *forum non conveniens*, P10 sued in Canada before and makes no
24 showing that it cannot do so again. Canada is the suitable forum, since the records
25 and acts of copying, if any, are on servers there. The iWeb witnesses who could
26 testify about those records and copying are in Canada. P10 has previously insisted
27 on litigating in Canada, even with a parallel case pending in the United States.
28 There is no language barrier, and Canadian courts may apply United States law just

as United States courts often apply foreign laws.

III. VENUE IS IMPROPER IN THE SOUTHERN DISTRICT.

Section 1391(c)(3) on venue “cannot (and is not intended to) override the constitutional constraints that govern the propriety of asserting personal jurisdiction over a defendant.” *TH Weiss, Inc. v. Newland N. Am. Foods, Inc.*, No. 13-1079, 2013 U.S. Dist. LEXIS 20039, at *2 (N.D. Ill. Feb 13, 2013). While iWeb is not subject to jurisdiction anywhere in the United States for P10’s claims, P10 tacitly concedes that venue here is improper and does not object to transfer to the Central District, where this Court previously transferred another case because of P10’s lack of connection with this District. Opp. at 3:13-14; *Perfect 10, Inc., v. Giganews, Inc.*, No. 11-cv-905, 2011 U.S. Dist. Lexis 157429 (S.D. Cal. Aug. 25, 2011).

IV. P10 PLED NO VOLITIONAL ACT OF DIRECT INFRINGEMENT.

P10 concedes that Defendants do not engage in any volitional acts that directly infringe either the reproduction or public display rights; it argues only that iWeb “distributes” infringing images. See Opp. at 15. But P10 fundamentally misunderstands both the volition requirement and the Copyright Act’s definition of the copyright owner’s exclusive “distribution” right.

A. P10 Alleges Nothing But Passive, Automated Conduct.

P10 incorrectly claims that there is no volition requirement to direct infringement. Courts of Appeals that have squarely examined the issue, the Second and Fourth Circuits, require volitional conduct, and it is a longstanding doctrine of copyright law that emanated from *Religious Tech. Ctr. v. Netcom On-line Commc’n Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995), a case from this Circuit.² *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 131 (2d Cir. 2008), cert. denied 129 S. Ct. 2890 (2009); *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 551 (4th Cir. 2004); see also *Giganews*, 2013 WL 2109963, at *6 (listing cases

² As the court in *Giganews* noted, the Ninth Circuit’s silence thus far on the volitional requirement does not indicate disapproval. 2013 WL 2109963, at *7.

1 following *Netcom*)). The Fourth Circuit specifically held that failure to remove an
2 allegedly infringing image is *not* a volitional act. *LoopNet*, 373 F. 3d at 556.

3 P10 is thus incorrect that a defendant's "refusal to remove identified
4 infringing material from [its] servers and continue to directly distribute those
5 images is clearly a volitional act" (Opp. at 15:19-20). P10 cites *Perfect 10, Inc. v.*
6 *Amazon.com, Inc.*, but there the Ninth Circuit explicitly disclaimed: "[W]e do not
7 address whether an entity that merely passively owns and manages an Internet
8 bulletin board or similar system violates a copyright owner's display and
9 distribution rights when the users of the bulletin board or similar system post
10 infringing works." 508 F.3d 1146, 1160 n.6 (9th Cir. 2007).

11 What P10 actually alleges is "[w]hen an *individual user* . . . clicks on a link
12 to access a particular image file, a request is sent to the server for that image file[.]"
13 Opp. at 15:11-13; *see also* Opp. at 18:11-14 (arguing that a *user's* uploading and
14 downloading of copyrighted content violates P10's distribution and reproduction
15 rights respectively). P10 does not, and cannot, allege that iWeb did anything but
16 provide servers. A user's act leads to the alleged copying onto its dedicated server.
17 This is not a volitional infringing act attributable to iWeb. *See Giganews*, 2013 WL
18 2109963, at *7 (finding no volition in providing virtual machines "that some []
19 users have used to create illegal copies"). And even if, *arguendo*, iWeb's conduct is
20 deemed volitional, it was extraterritorial, since all iWeb operations and personnel
21 are in Canada (Toupin Decl. ¶ 5), something P10 no longer appears to dispute.

22 **B. The Complaint Does Not Allege Distribution of Material Objects.**

23 P10 argues a different construction of the "distribution" right from what the
24 Copyright Act defines, which is the right "to distribute *copies or phonorecords* of
25 the copyrighted work to the public *by sale or other transfer of ownership, or by*
26 *rental, lease, or lending.*" 17 U.S.C. § 106(3) (emphasis added). "Copies" are
27 "*material objects*, other than phonorecords, in which a work is fixed by any method
28 now known or later developed, and from which the work can be perceived,

reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” § 101 (emphasis added). Transmission of works over the Internet does not fall within this definition, as there is no *transfer of ownership* of the *material objects* (i.e., the physical servers) containing the work. See *Agee v. Paramount Commc’ns, Inc.*, 59 F.3d 317, 325 (2d Cir. 1995) (broadcast transmission not a distribution because no material object changes hands). P10 cites no case that holds otherwise. In *Amazon.com*, though the court considered in *dictum* whether the Supreme Court in *N.Y. Times Co. v. Tasini*, 533 U.S. 483 (2001), indicated that an electronic transmission could constitute a public distribution, the court found that the defendant never had the material objects in the first place and therefore could not possibly have distributed them. *Amazon.com*, 508 F. 3d at 1162. The *Tasini* statement itself is *dictum*, as the only question was whether Section 201(c)’s collective works rule applied, and the Court never examined the “material objects” requirement of 17 U.S.C. § 101. 533 U.S. at 487-88. *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, on the other hand, involved *lending* of a *physical copy* of the work at issue. 118 F.3d 119, 203 (4th Cir. 1997). Defendants undisputedly do not distribute any material objects, and the Court need not accept P10’s groundless legal conclusions. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

V. P10 INSUFFICIENTLY PLED INTENTIONAL INDUCEMENT OR ENCOURAGEMENT OF OTHERS TO INFRINGE.

P10 mischaracterizes the law of contributory infringement. The Supreme Court definitively stated in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*: “One infringes contributorily by intentionally inducing or encouraging direct infringement.” 545 U.S. 913, 930 (2005). The classic example of intentional inducement or encouragement is advertising an infringing use, something P10 has not pled. *Id.* at 935. Contrary to P10’s assertion, the Supreme Court has never adopted an alternative, distinct test of “knowledge of infringement and material contribution.” Opp. at 17:6-10. After *Grokster*, the Ninth Circuit explained that a

1 court may *impute* intent to induce or encourage when a defendant “knowingly takes
2 steps that are substantially certain to result in such direct infringement,” but it did
3 not eliminate *Grokster*’s intent requirement. *Amazon.com*, 508 F.3d at 1171.

4 P10 ignores the Ninth Circuit’s most recent jurisprudence on contributory
5 liability. In *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1038 (9th Cir.
6 2013), the Ninth Circuit analyzed *Grokster* and *Sony Corp. of Am. v. Universal City*
7 *Studios, Inc.*, 464 U.S. 417 (1984), and re-emphasized that “proper proof of the
8 defendant’s intent that its product or service be used to infringe copyrights is
9 paramount.” Unlike the plaintiff in *Fung*, P10 has pled no facts that iWeb provided
10 its services “with the object of promoting its use to infringe copyright, as shown by
11 clear expression or other affirmative steps taken to foster infringement.” *See id.* at
12 1034. The *Grokster* rule “requires a high degree of proof of the improper object.”
13 *See id.* “[M]ere knowledge of infringing potential or of actual infringing uses” is
14 insufficient. *Id.* Further, “in the absence of other evidence of intent, a court would
15 be unable to find contributory infringement liability merely based on a failure to
16 take affirmative steps to prevent infringement.” *Id.* at 1035. P10 fails to allege any
17 clear expression or other affirmative acts that constitute such evidence of intent.

18 The circumstances in *Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc.*,
19 658 F.3d 936 (9th Cir. 2011) are not “almost identical” as P10 claims (Opp. at
20 16:10). *Akanoc* concerned two web hosting companies, one of whom (MSG) the
21 Ninth Circuit held *not* liable even though each company’s manager knew of the
22 alleged infringement by websites on their servers. *Id.* at 942. MSG owned the
23 servers in question, which it leased, along with bandwidth and IP addresses, to
24 Akanoc for web hosting. *Id.* Citing *Amazon.com*, the court in *Akanoc* noted that an
25 ISP’s intent to contribute to infringement can be imputed. *Id.* at 943. But in
26 *Amazon.com*, the Ninth Circuit held that such imputation requires that the
27 defendant “has *actual* knowledge that *specific* infringing material is available using
28 its system, and can take *simple* measures to prevent further damage to copyrighted

works, yet continues to provide access to infringing works.” *Amazon.com*, 508 F.3d at 1172 (emphasis added) (internal quotation marks and citations omitted). Accordingly, MSG was not contributorily liable because it lacked “reasonable means to withdraw services to the direct infringers,” *Akanoc*, 658 F.3d at 942, *even though MSG could have physically pulled the plug or stopped leasing servers to Akanoc*. Here, P10’s conclusory allegation that Defendants could have taken “simple” measures to stop infringement (Compl. ¶ 28), has no plausible factual basis in the Complaint. Without its wild (and abandoned) allegations regarding NDN (*see* Opp. at 1, n.1; Dkt. No. 8), P10 alleges nothing more than that Defendants, like MSG, own and make available servers to others who may use them properly or improperly. A complaint with “naked assertion[s] devoid of further factual enhancement” is insufficient to survive a motion to dismiss. *Iqbal*, 556 U.S. at 678 (quotation marks omitted). P10 does not allege any “simple” method by which Defendants could have removed the images at issue.³

The Court should dismiss the Complaint on both jurisdictional and substantive grounds.

Dated: June 20, 2013

FENWICK & WEST LLP

By: /s/ Andrew P. Bridges

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IWEB GROUP, INC.,
IWEB INTELLECTUALPROPERTY, INC.,
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³ P10 chided Defendants for failure to cite *Akanoc*. But *Akanoc* did not itself cite the controlling *Grokster* decision, and the Ninth Circuit’s recent decision in *Fung* did not refer at all to *Akanoc*. *Grokster* and *Fung* supply the current standards.